SEA RIGHTS AND SEA POWER: THE BRITISH EMBARGO

EDWARD S. CORWIN

Two pre-eminent developments of international law of the last century have found, if not origin, yet indispensable support in Rousseau's dogma, that wars are affairs of governments and not of peoples. It is not surprising then that both these have gone down in a war so entirely belying this idea as the present one. The developments I refer to are, first, the extension of the rules which have for their purpose the mitigation of the severities of warfare on land, particularly along the line of the differentiation of combatants from non-combatants; and secondly, the extension and clarification of the rules which are meant to guarantee neutral trading rights on the high seas. The first of these developments attained culmination in the Hague Convention of 1907; the other, in the Declaration of London of three years later: both have succumbed in the present war, the one to the German idea of *Schrecklichkeit;* the other to British naval policy. Nor is this more than the commencement of the story, for the justification which each belligerent party has shaped for its favorite obliquity infers the permanent prostration of international law before a sufficiently pressing belligerent interest. Thus, German apologists frankly urge the theory of *Kriegsraison,* which, in the expressive phrase of Clausewitz, must always be " the secret worm " eating away the timbers of the legal edifice. English apologists, on the other hand, true to the instinct of the Anglo-Saxon for " legal hypocrisies," seek today to represent their nation's infractions of some of the most vital concepts of the law of nations as vindication and fulfillment thereof, and in so doing, whether of intention or not, dexterously convert a present emergency into an opportunity for the

permanent aggrandizement of sea power at the expense of sea rights, since it is apparent that if the argument which has finally been formulated for British naval policy prevails, international law will have been remade, not merely for the present war but for an indefinite future.

British naval policy touching the trading rights of neutrals has gone through several phases since the outbreak of hostilities. At first the British Government professed anxiety to carry on war in general conformity with the Declaration of London, which in fact the British Executive had already accepted though Parliament had refused the legislation necessary to carry out the engagement thus contracted. Finding this idea disadvantageous the Government next had recourse to a considerable extension of the contraband list and to the detention on a large scale of neutral vessels headed for German, Dutch and Scandinavian ports, for the pretended purpose of ascertaining if they were carrying contraband. At the same time, by decreeing that goods consigned " to order " by way of such ports should be conclusively presumed to be intended for the use of an enemy government, it took a long step toward eliminating the distinction between goods " absolutely " contraband and goods " conditionally " contraband—a journey since completed. Meantime, early in February, 1915, the German Government proclaimed a " war zone " about the British Isles and began to make war on the seas in a fashion outraging not only international law but the humane sensibilities of neutrals. As after the invasion of Belgium, the British Government now found itself presented with an opportunity to undertake on high moral grounds what it would undoubtedly have undertaken sooner or later on grounds of policy, namely, to proclaim an embargo upon all neutral trade with Germany, which was done by the Order in Council of March 11, 1915. Since this date the development of British policy has taken place mainly in the field of apologetics. The original argument for the embargo was that it was justified as a measure of reprisal to which, on account of the nature of Germany's infractions of international law, neutrals were morally obliged to assent. But very early Downing Street began to endeavor to assimilate the Order in Council to recognized rules of international law, and especially the doctrine of "ultimate destination." Finally, by the Order in Council of July 7 last, new teeth have been inserted in the

embargo at the same time that its legal regularity has been most confidently reaffirmed.

Mr. Asquith's announcement of the embargo on March 1, 1915, was couched in the following terms:

> The British and French Governments will hold themselves free to detain and take into port ships carrying goods of presumed enemy destination, ownership, or origin. It is not intended to confiscate such vessels or cargoes unless they would otherwise be liable to condemnation. . . . That, Sir, is our reply. . . . Now, the committee [of the Whole House] will have observed, from the statement I have just read out of the retaliatory measures we propose to adopt, the words " blockade " and " contraband " and other technical terms of international law do not occur, and advisedly so. In dealing with our opponent, who has openly repudiated all the restraints both of law and humanity, we are not going to allow our efforts to be strangled in a net work of juridical niceties. We do not intend to put into operation any measures which we do not think to be effective, and I need not say we shall carefully avoid any measures which violate the rules either of humanity or of honesty. Subject to these two conditions, I say to our enemy—I say it on behalf of the Government, and I hope on behalf of the House of Commons—that under existing conditions there is no form of economic pressure to which we do not consider ourselves entitled to resort. If as a consequence neutrals suffer inconvenience or loss of trade, we regret it, but we beg them to remember that this phase of the war was not initiated by us. We do not propose either to assassinate their seamen or to destroy their goods, and what we are doing we do solely in self-defense.

In a speech widely circulated in this country through the indefatigable agency of Sir Gilbert Parker some months after the institution of the embargo, Mr. Balfour extends and develops the Premier's argument. " Those," he urges, "who will consent to consider the present case on its merits will, I think, be persuaded that the policy of the Allies has a conclusive *moral* justification." Thereupon, however, he proceeds to convert this supposed *moral* justification into a species of *legal* one, on the warrant of the following propositions: 1. International law consists of two sorts of rules, one of which embody ethical considerations, the other of which do not. 2. When of two enemies one violates the former sort, the other is entitled in retaliation to violate the latter sort. 3. neutrals, being equally responsible with belligerents for the future development of international law, are bound to assent to such acts of retaliation.

This argument has conspicuous weaknesses. For one thing, neutrals have never recognized the obligation which Mr. Balfour would foist upon them, of coming to the defense of what he terms "international morality," save when their own rights have been involved in a violation thereof. For another thing, the distinction which he offers between "the rights of humanity" and "the merely technical" rights which international law safeguards is one impossible to maintain in the midst of the allowable severities of war. Indeed, even the relative harshness of two different acts, both illegal, will not necessarily determine the full course of a neutral's duty to itself, since a subtle perversion of the rules of international law may in the long run be actually more destructive of the lives of neutral subjects than a crime of sheer brutality like the sinking of the *Lusitania*. But the most fatal weakness of all of the argument of reprisal was the impermanence it postulated for the measures it defended. For let Germany abandon her threatened illegal courses, and what would become of Great Britain's moral justification? The question was the more pressing in that British sentiment, while treating Germany's menaces with derision, clearly expected the projected act of reprisal to become a decisive factor of the War.

But another consideration also was cogent in determining the British Government to defend its prohibition of neutral commerce with Germany as legally regular. As we have seen, Mr. Asquith explained his Government's failure to use the terms "blockade" and "contraband" as due to its desire not to see its measures "strangled in a network of juridical niceties." He seemed thus to imply that, had these terms been used, British prize courts would have been free to adjudicate cases arising under the Order in Council in conformity with the law of blockade and contraband. Accordingly, an influential section of the American press of pro-Ally tendency began demanding that the British Government should "frankly" characterize the measures which the Premier's statement had foreshadowed, as measures of "blockade." In Sir Edward Grey's note of March 15, replying to the American protest of ten days earlier against the proposed course of action as one "previously unknown to international law," this demand is met. "His Majesty's Government," Sir Edward wrote, "have felt most reluctant at the moment of initiating *a policy of blockade* to exact

from neutral ships all the penalties attaching to a breach of blockade. They restrict their claim to the stopping of cargoes destined for or coming from the enemy's territory." Thus measures which it was at first conceded would infract the ordinary rights of neutrals are finally presented as making concession to those rights! But at any rate, the tone thus taken proved effective in conciliating the pro-Ally American press, which has ever since treated the embargo as regular, albeit the Order in Council still lacks the term "blockade."

The case in law against the British embargo is summed up in the statement that the embargo at once falls short of the legal tests of a blockade and transcends them. It does the former because Great Britain has not yet succeeded in blockading the German Baltic ports against Scandinavian traders, while it is a fundamental requirement of a blockade that it operate impartially upon all neutrals.

This objection to the embargo the British Government and its spokesmen have sought to meet in various ways. Practically, it has endeavored to establish a real blockade of the German Baltic ports by means of submarines but has thus far failed in the effort. In its answer of July 23, 1915, to the American note of the previous March 30 it entirely ignores the argument based on the discriminatory character of the embargo. Mr. Balfour, in the speech just quoted from, is less evasive but not more convincing. "The 'discrimination,'" he asserts, "(if it is to be so described) is not the result of a deliberate policy but of a geographical accident." It may be conceded that the primary intention of the British embargo is to injure Britain's enemies and that the injury resulting to neutrals is incidental merely; but so it ever was in cases of this sort. Besides, as Mr. Balfour himself concedes, the injury in question *is* "a result"; and it is *results* which the law governs—not motives. Then as to "geographical accidents"—the position of any state on the map "is a geographical accident"; yet it is to govern the relations springing from such "geographical accidents" precisely that international law exists. Indeed, it is difficult to see why Mr. Balfour's argument does not give Germany license to justify her invasion of Belgium by pleading that Belgium's position on the map is a "geographical accident."

Finally, in his long delayed reply of April 24 of this year

to the American note of November 5 last, Sir Edward Grey devotes a passing word to the discriminatory feature of the embargo, thus:

> Even if these measures were judged with strict reference to the rules applicable to blockade, a standard by which in their view, the measures of the Allies ought not to be judged, it must be remembered that the passage of commerce to a blockaded area across a land frontier or across an inland sea has never been held to interfere with the effectiveness of a blockade.

The argument is entirely beside the point, since the question at issue is not of the *effectiveness* of the embargo but of its *partiality*. Nor can one accept the idea that the embargo should not be strictly tested by international law merely because, as Sir Edward suavely urges, Great Britain does not exercise the rigor she might in connection with a legitimate blockade—in other words, if she were acting within the law instead of in contravention of it! And the description of the Baltic, whose waters wash the shores of five nations, as "an inland sea," seems a trifle far-fetched, to say the least. Yet were it a German fish-pond, the fact would only serve to put Scandinavian ports in the same category with the Dutch ports as ports of entry to Germany.

We are thus brought to the really fundamental objection to the embargo—its inhibition of neutral commerce with Germany through neutral ports and waters. This feature of the Order in Council does in fact transgress some of the best defined securities of neutral rights, and that in the most remarkable and far-reaching fashion. In endeavoring to stop the neutral carriage of innocent goods passing to and from Germany through neutral ports England, in the first place, transcends the legal definition of "blockade," which in the language whereby the Declaration of London simply sums up all authority upon the subject, "must be limited to the ports and coasts belonging to or occupied by the enemy";* in the second place, abolishes the fundamental distinction made by international law between "innocent" goods and goods "absolutely contraband"; and in the third place, abrogates the second article of the Declaration of Paris, which decrees

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* Mr. Asquith himself, in the very speech in which he proposed reprisals against Germany, ridiculed the idea that Germany had established a blockade of Great Britain, saying: "What is a blockade? A blockade consists in sealing up the war ports of a belligerent against sea-borne traffic, by encircling their coast with an impenetrable ring of ships of war." Parl Debates, LXX, col. 597.

that enemy goods shall not be subject to capture except when found on an enemy vessel.

We turn to review the arguments by which the British Government seeks to assimilate these extraordinary innovations to the existing fabric of international law. To begin with, Sir Edward Grey is careful to protest against the British measures being described as a " blockade of neutral ports," the phrase used by our State Department. He is of course quite right, for the reason that there can be no such thing. However, the admission is interesting, and fatal to Sir Edward's general argument. For if there can be no stoppage of innocent goods destined for an enemy port unless that port be blockaded, how can there be such a stoppage when the destination is a neutral port which is neither blockaded nor legally liable to blockade? If called on to answer this question Sir Edward would doubtless instance the doctrine of " continuous voyage " or " ultimate destination," which furnishes in fact his principal reliance; but as we shall see in a moment, the answer would be unavailable.

But before considering the bearing of the idea of " continuous voyage " on the general question of the legality of the British embargo, one or two other arguments should be reviewed. In his note of July 23, 1915, Sir Edward, citing an intimation in the American note of March 30 of the readiness of the American Government to take into account " the great changes which have occurred in the conditions and means of naval warfare since the rules hitherto governing legal blockade were formulated," writes thus: "The only question, then, which can arise in regard to the measures resorted to for the purpose of carrying out a blockade . . . is whether . . . they ' conform to the spirit and principles of the essence of the rules of war.' " The answer to this argument is plain: Whatever latitude be accorded the idea that law undergoes development, yet if there is to be any law at all the idea in question must have certain limitations; and if this is so, where are these limitations to be found if not in established and universally recognized precepts of existing law? *The objection to the British embargo is not merely that it establishes a new kind of interference with commerce but that the kind of interference with commerce which it establishes is definitely and distinctly prohibited by positive rules of international law.* In the same document Sir Edward further implies that the test of

whether "adaptations of old rules" are allowable or not is furnished by the belligerent interest. This cannot be admitted even for adaptations meant to supply recognized gaps in the law. Far less can it be admitted to the derogation of existing law.

Coming then to the heart of Sir Edward's position, we find him putting his whole case in the following sentence:

> It seems, accordingly, that if it be recognized that a blockade is in certain cases the appropriate method of intercepting the trade of an enemy country, and if the blockade can only become effective by extending it to enemy commerce passing through neutral ports, such an extension is defensible and in accordance with principles which have met with general acceptance.

Other passages of the note make it clear that the "principles" referred to are those embodied in the doctrine of "continuous voyage" and "ultimate destination" as enforced by the American courts in the Civil War, and especially in the famous case of the *Springbok,* to which in fact Sir Edward makes specific reference.

It may be seriously doubted, I think, whether the doctrine of the *Springbok* case has ever become a part of international law, by which the United States is entitled, whatever may have been its practice as a belligerent, to insist that its rights as a neutral be measured. Referring to the cases of the *Bermuda* and the *Springbok,* the distinguished English authority Hall writes: "The American decisions have been universally reprobated outside the United States and would probably now find no defenders in their own country." It is true that the British member of the commission which passed upon British claims against the United States arising out of the Civil War assented to the Supreme Court's decision in the *Springbok* case, but he may have been influenced thereto by considerations of expediency. Certain it is that in 1908 the British Government, in its instructions to its delegates to the London Conference, rendered an interpretation of this case which amounts to a total rejection of its authority for the law of blockade. The passage in the instructions that is referred to reads: "It is exceedingly doubtful whether the decision of the Supreme Court was in reality meant to cover a case of blockade-running *in which no question of contraband arose.* Certainly, if such was the intention the decision would *pro tanto* be in

conflict with the practice of the British courts." Finally, several years before this the *Institute de Droit International*, in a report signed by the most eminent English and Continental authorities, had denounced the *Springbok* decision as in contravention of the law of nations and had called upon our Government to repudiate it "at an early opportunity."

Yet suppose we admit the entire validity of this much controverted adjudication and, further, that it dealt only with blockade-running—would it then support the British embargo? No. In the *Springbok* case goods consigned ostensibly to British West Indian ports were seized before they reached their immediate destination and confiscated on the ground that they were intended ultimately to pass an established blockade,—an act penalized by international law. The British Order in Council on the other hand purports to authorize the interception of non-contraband cargoes destined to pass through the unblockaded ports of neutrals, over a land frontier also unblockaded, into the interior of the enemy country,—an entirely innocent act under international law. In both cases the ultimate destination of the goods involved is the enemy country; but in the earlier case the attainment of this destination would have involved a further sea voyage with a breach of blockade at the end, whereas in the present case it involves neither of these incidents, wherefore the goods involved can be validly seized only if they are absolute contraband. In short, as I pointed out before, the British embargo abolishes outright the fundamental distinction between "innocent" goods and goods "absolutely contraband," save as to penalty.

Nor are precedents lacking to emphasize this differentiation of the American case from those arising under the British embargo. Thus there are numerous decisions by the great Lord Stowell, dating from the Napoleonic wars, which establish the proposition that a maritime blockade can have no operation upon the interior communications of a blockaded port, even though such communications take place over the enemy's territory.* How much less then could a maritime blockade of German ports, albeit in all respects regular, operate to prevent shipments through neutral ports and territory to the interior of Germany! And the vast majority of German ports are not blockaded!

* See the *Jonge Pieter*, 4 C. Rob., 79; the *Stert*, *ib.*, 65; the *Ocean*, 3 ib., 297. The first-named is especially in point.

But it is an American precedent, decided by the same tribunal that decided the *Springbok* case, that really gives the *coup de grace* to the British argument. This is the case of the *Peterhof,* in which the court decreed the confiscation of the contraband portion of a cargo the immediate destination of which was the Mexican port of Matamoras, on the basis of evidence showing its destination to be the enemy forces stationed across the river in the Texas town of Brownsville. The Federal authorities, however, had urged a decree of confiscation covering the *Peterhof's* entire cargo, on the ground that it was destined for the interior of Texas and other States in rebellion and that this interior destination constituted a breach of blockade. The court rejected the argument, saying:

> Such trade, with unrestricted inland commerce between such a port and the enemy's territory, impairs undoubtedly, and very seriously impairs, the value of the blockade of the enemy's coast. But in cases such as those now in judgment we administer the public law of nations and are not at liberty to inquire what is for the particular advantage or disadvantage of our own or another country.

So I repeat again, the Order in Council, in inhibiting neutral commerce with Germany by way of neutral ports, eliminates, as to goods destined to Germany, the distinction between innocent goods and contraband goods, condemning both alike simply because of their enemy destination. And as to goods of German origin which are in process of carriage from neutral ports to neutral ports, the operation of the Order in Council is, if possible, still more exceptionable. By the ancient British-American rule such goods ordinarily belong to consignee and are therefore to be reckoned as neutral property. But were they enemy property they would not, under the Declaration of Paris, be subject to capture on that account unless they were encountered, either on the high seas or in enemy waters, on board an enemy vessel. So extraordinary indeed is this feature of the embargo that Sir Edward Grey has not ventured to defend it, save to hint vaguely that possibly the Declaration of Paris does not apply as between Great Britain and the United States and to assert that goods of the category under discussion are intercepted not in their quality of enemy property but because of their enemy origin. The latter suggestion is obviously irrelevant, since the

Declaration of Paris does not except goods of enemy origin from its operation; and the former suggestion is absurd. Every writer on public law during the last half century has recognized the Declaration of Paris as one of the pillars of the law of nations; and the United States has fought through two wars in conformity with its provisions.

Lastly, in his note of April 24, Sir Edward recurs once more to the right of reprisal. He writes:

> His Majesty's Government are surprised to notice that the Government of the States seem to regard all measures of retaliation in war as illegal if they should incidentally inflict injury upon neutrals. The advantage which any such principle would give to the determined law-breaker would be so great that His Majesty's Government cannot conceive that it would commend itself to the conscience of mankind. . . . Suppose that a neutral failed to prevent his territory being made use of by one of the belligerents for warlike purposes, could he object to the other belligerent acting in the same way? It would seem that the true view must be that each belligerent is entitled to insist on being allowed to meet his enemy on terms of equal liberty of action. If one of them is allowed to make an attack upon the other regardless of neutral rights, his opponent must be allowed similar latitude in prosecuting the struggle, nor should he in that case be limited to the adoption of measures precisely identical with those of his opponent.

The purport of this passage is somewhat ambiguous. If Sir Edward means merely that a neutral has a responsibility correlative with its rights and cannot, therefore, allow these to be overridden by one belligerent to the disadvantage of the other without showing the latter a like complaisance—unless, of course, it chooses to forfeit its status as neutral—he is quite right; but it is difficult to see how this principle can profit him anything at the present juncture so far as the United States is concerned. For our Government has not permitted Germany's infractions of American rights on the high seas to go unresisted but, on the contrary, has forced their cessation in great part. But England's infractions of our sea rights, undertaken in retaliation against Germany, increase from day to day. The real outcome of Sir Edward's argument so interpreted is, therefore, not the justification of the British embargo but the illumination of America's present duty as a neutral to oppose it.

But Sir Edward's words may mean something far differ-

ent, namely, the general subordination of neutral rights to the belligerent right of reprisal. It is hardly necessary to say that such a contention must fall of its own weight. Moreover, it is an illogical contention; for what is this right of reprisal but one of the constituents of that right of war against which, in its totality, neutral rights are supposed to be safeguarded? Again, the trend of British decisions is all against the idea that neutral rights must yield place to the right of reprisal. Only the other day the Judicial Committee of the Privy Council thus summarized a decision of Lord Stowell sustaining certain Orders in Council made by way of reprisals for Napoleon's Berlin and Milan Decrees:

> The decision proceeded upon the principle that where there is just cause for retaliation neutrals may by the law of nations be required to submit to inconvenience from the acts of a belligerent Power greater in degree than would be justified had no just cause for retaliation arisen.*

To pass, however, from a right to cause "inconvenience" some degree greater than that ordinarily allowable to a claim of right to proceed "regardless of neutral rights" is clearly to move somewhat briskly. Altogether, I doubt if issue can be legitimately joined with the assertion of our State Department in its second *Lusitania* note, that "a belligerent act of retaliation is *per se* an act beyond the law, and the defense of an act as retaliatory is an admission that it is illegal."

And thus much for the main issue between Downing Street and Washington. There is, however, a secondary issue so closely related with the primary one as to demand our attention, and especially in the light shed upon it by the recent decision of the Judicial Committee of the Privy Council in the case of the *Zamora*. One phase of this issue is indicated by Mr. Lansing's challenge, in his note of November 5 last, of the contention of Sir Edward Grey, that the substantive law enforced by the British Prize Court is supplied not by municipal law but by the law of nations as known to that tribunal. The *Zamora* decision supports Sir Edward's contention to this extent: It is decided, and perhaps for the first time, that Orders in Council based merely

* From the Judicial Committee's decision in the case of the *Zamora*. The decision of Lord Stowell's referred to is that in the case of the *Fox*, Edw. 311. To the same effect is decision in the *Lucy*, *ib.*, 122.

on the royal prerogative cannot overrule or authoritatively interpret international law even on doubtful points. At the same time, it is clearly indicated that an act of Parliament or an Order in Council based thereon would comprise a construction of the law of nations which no British court would be free to traverse.*

This result, however, raises a further question. In his note of April 24th last Sir Edward Grey urges that "in cases where the [British] Prize Court has power to grant relief there is no ground for putting forward claims through the diplomatic channel," at least till a decision has been had,—a doctrine to which their Lordships bring support in their opinion in the *Zamora* case. Granting the proposition to be sound—though it certainly requires important qualification—the question that emerges is whether our Government is thus prevented from protesting the embargo till a judicial decision has been rendered in some case of seizure arising under it. The answer is "no." For one thing, the precedents upon which both their Lordships and Sir Edward rely are, I believe, cases in which the seizures adjudicated had been originally made in alleged exercise of belligerent rights known to international law, whereas the Order in Council establishing the embargo, though defended by the Foreign Office as harmonious with international law, does not itself, as we have seen, make any reference to concepts of that branch of jurisprudence, but is in form and phraseology a mere emanation from municipal authority, which British naval commanders must nonetheless obey on the high seas. But even

* It should be noted in passing that the *Zamora* decision lays to rest Mr. Thomas Gibson Bowles' contention that the British Prize Court would have to decide cases arising under the embargo by the old rule of the *Consulato del Mare*. Mr. Bowles' argument rests on the decision of the Lords in the well-known case of *Queen v. Keyn* (Law Reps., 2 Exchcq. Div., 63), that before any change in the law of nations, as embodied in the precedents, can be recognized by English courts, it must have received formal Parliamentary adoption; and on the fact that the Declaration of Paris has never been ratified by Parliament. But that the rule of *Queen v. Keyn* does not apply—unless, of course, Parliament should so decree—in the case of the Prize Court is clearly indicated by the following passage from their Lordships' decision in the *Zamora* case: "A court which administered international law must ascertain and give effect to a law which was not laid down by any particular state, but originated in the practice and usage long observed by civilized nations in their relations with each other or in express international agreement." I do not understand that Mr. Gibson Bowles denies that England is party to the Declaration of Paris in its quality as an international agreement, or that the royal prerogative is competent so to bind England. But the fact that the Declaration is *an international agreement* makes it, by the *Zamora* decision, law for the Prize Court.

more important is the consideration that the rule relied upon by Sir Edward applies, by his own statement, only to the sort of cases in which a prize court is able to accord an adequate remedy, that is, specific cases of *private* injury; whereas the injury done the American people by the embargo is one for which prize courts offer no means of reparation. Such an injury is, in Mr. Lansing's words, "the disastrous effect of the methods of the Allied Governments upon the general right of the United States to enjoy its international trade free from unusual and arbitrary limitations imposed by belligerent nations." It is the injury to the trade of the nation as a whole which ensues inevitably from the menace of "its lawful and established pursuit." Such an injury could by no possibility be relieved, or even passed upon, by a prize court.

In short, it is clear that the *Zamora* decision has not altered essentially either the substance or form of the issue between Great Britain and the United States arising out of the embargo. And it is equally apparent that the effect of the decision has not been to cause the British Government to moderate its measures, but rather the reverse. Thus in June occurred the Paris Economic Conference, which formulated a programme looking to the maintenance by the Allies even after peace of semi-war conditions in the sphere of international trade, and involving as its minimal result the consignment to the waste basket of all the "most favored nation" treaties to which the Allies are parties. Next came the publication of the "blacklist," the first fruit of the conference, whereby Great Britain, casting aside the test of domicile for determining enemy character, lists as "enemies" the firms of a friendly state, because, as she charges, they are controlled by "enemy capital," but actually because they have attempted to trade with her enemy,—a thing they would have the right to do, at the risks sanctioned by international law, even if the embargo were a real blockade. Then on July 7 a new Order in Council was adopted finally and frankly abrogating the Declaration of London. To be sure, this order contains the declaration that "it is and always has been" the intention of Great Britain and her Allies "to exercise their belligerent rights at sea in strict accordance with the law of nations"; but alongside this declaration stands a specific ratification of the earlier order, while to

it are added the following provisions, which, it is decreed, "shall be observed": First, that "the hostile destination required for the condemnation of contraband articles shall be presumed to exist until the contrary is shown, if the goods are consigned . . . to or for a person in territory belonging to or occupied by the enemy,"—a rule which in practice abolishes the distinction between "absolute" and "conditional" contraband and the like of which, when Russia sought to enforce it in the Russo-Japanese War, the English and American Governments protested vehemently and successfully; secondly, that "the principle of continuous voyage or ultimate destination shall be applicable both in cases of contraband and of blockade,"—*that is,* shall be applicable in the sense of merely "enemy destination," regardless of the quality of the goods and whether or not a blockade is infracted; thirdly, that a neutral vessel falsely indicating a neutral destination for the carriage of contraband "shall be liable to capture and condemnation if she is encountered before the end of her next voyage,"—a rule which has some slight support in precedent but is obviously susceptible of great abuse; fourthly, that "a vessel carrying contraband shall be liable to capture and condemnation if the contraband reckoned either by value, weight, volume, or freight, forms more than half the cargo,"—the single provision still retained from the Declaration of London," on account of its favorable character from the belligerent viewpoint. And meantime other infractions of international law continue unabated: the detention of cargoes in port for examination, which was begun with the ostensible purpose of hunting out contraband but has subsequently been found an essential adjunct of the embargo; the interference, with the same end in view, with neutral mails, whereby Great Britain has utterly pulverized the Hague Convention dealing with this matter; the listing of cotton as absolute contraband, which was done partly in order that carriage of this commodity might be visited with severer penalties than those imposed for infraction of the embargo, and partly to enable the Foreign Office to juggle more confusingly with the concept of "enemy destination."

Nor is the whole story told if we confine our attention to the measures of the British Government. For meanwhile the British publicist, casting about for some make-

weight to Germany's military conquests, will be seen to be elaborating the theory that England has effected a like conquest of the seas, the common heritage of mankind. And the British publicist is quite right. England's conquest is not a territorial conquest precisely: it consists in an entire prostration of the rules that safeguard neutral trading rights. But the practical result is the same. It is not merely that Germany must come to terms with the British fleet ere her own vessels can again take the seas: she must do so before she can have any commercial relations whatsoever overseas; or what is the same thing, before neutrals can have any such relations with her. In other words, the English publicist reckons that, when it comes to making peace, the continued acquiescence of neutrals in the cancellation of their sea rights will furnish England her greatest asset against German military success.

The issue which the British embargo presents our Government at the present moment is this: Are we to resist it effectively and so preserve our trading rights and our neutrality, or are we passively to acquiesce in it and *pro tanto* surrender both these? There may be considerations of policy counseling the latter course, but at least the issue involved should be fully comprehended. It should also be comprehended that to adopt the policy of acquiescence—or rather to persist in it—is to sacrifice the maxim that originally gave rationality to our position as a neutral and the successful enforcement of which would have meant the greatest service, perhaps, that America could at such a crisis have performed in the cause of international peace,—the maxim that international law is not to be changed while war is going on. Finally, the policy of acquiescence raises this query: Do we wish to have sea power permanently enhanced to the extent represented by present British naval policy and the defense made of it by its apologists? The question has to be considered not merely in the light of the possibility of England remaining mistress of the seas but also in that of the contrary possibility.

EDWARD S. CORWIN.